



**IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK**

**BEFORE S/SHRI GEORGE MATHAN, JUDICIAL MEMBER
AND ARUN KHODPIA, ACCOUNTANT MEMBER**

ITA No.260/CTK/2020: Assessment Year :2010-2011

ITA No.261/CTK/2020: Assessment Year :2011-2012

ITA No.262/CTK/2020: Assessment Year :2012-2013

ITA No.263/CTK/2020: Assessment Year :2013-2014

ITA No.264/CTK/2020: Assessment Year :2014-2015

Asst. Commissioner of Income Tax, Circle-1(1), Sambalpur	Vs.	M/s. TRL Krosaki Refractories Ltd., Belpahar, Jharsuguda
PAN/GIR No.AAACT 6494 Q		
(Appellant)	..	(Respondent)

**C.O. Nos. 9 to 13/CTK/2021
(in ITA Nos.260 to 264/CTK/2020)
Asst. Years: 2010-11 to 2014-2015**

M/s. TRL Krosaki Refractories Ltd., Belpahar, Jharsuguda	Vs.	Asst. Commissioner of Income Tax, Circle-1(1), Sambalpur
PAN/GIR No.AAACT 6494 Q		
(Appellant)	..	(Respondent)

Assessee by : S/Shri Ajit Korde/Bunty Sharma
Revenue by : Shri M.K.Gautam, CIT DR

Date of Hearing : 23/8/2022

Date of Pronouncement : 23/8/2022

ORDER

Per Bench

ITA No.260/CTK/2020 is filed by the revenue against the order of the Id CIT(A), Cuttack dated 18.9.2020 in Appeal No.0095/2017-18 in the matter of assessment under section 143(3) of the Act for the assessment year 2010-2011. C.O. No.9 is filed by the assessee in revenue's appeal for the assessment year 2010-2011.

2. ITA No.261/CTK/2020 is filed by the revenue against the order of the Id CIT(A), Cuttack dated 18.9.2020 in Appeal No.0036/2016-17 in the matter of assessment under section 147 r.w.s 144 of the Act for the assessment year 2011-2012. C.O. No.10 is filed by the assessee in revenue's appeal for the assessment year 2011-2012.

3. ITA No.262/CTK/2020 is filed by the revenue against the order of the Id CIT(A), Cuttack dated 18.9.2020 in Appeal No.0037/2016-17 in the matter of assessment under section 143(3)/92CA of the Act for the assessment year 2012-2013. C.O. No.11 is filed by the assessee in revenue's appeal for the assessment year 2012-13.

4. ITA No.263/CTK/2020 is filed by the revenue against the order of the Id CIT(A), Cuttack dated 21.9.2020 in Appeal No.667726641170317 in the matter of assessment under section 143(3) r.w.s 92CA of the Act for the assessment year 2013-14. C.O. No.12 is filed by the assessee in revenue's appeal for the assessment year 2013-14.

5. ITA No.264/CTK/2020 is filed by the revenue against the order of the Id CIT(A), Cuttack dated 21.9.2020 in Appeal No.405056741210218 in the matter of assessment under section 143(3) r.w.s 92CA of the Act for the assessment year 2014-15. C.O. No.13 is filed by the assessee in revenue's appeal for the assessment year 2014-15.

6. Shri M.K.Gautam, Id CIT DR appeared on behalf of the revenue and S/Shri Ajit Korde and Bunty Sharma, Id ARs appeared on behalf of the assessee.

7. As all the appeals and cross objections relate to one assessee, same are heard together and are being disposed of by this common order for the sake of convenience.

8. It was submitted by Id CIT DR that the Id CIT(A) had quashed the assessment orders for all the assessment years on the ground that no draft assessment orders had been passed u/s 144 C of the Act in respect of additions made under section 92CA of the Act. It was the submission that show cause notice in the form of a notice u/s.142(1) had been issued by the Assessing officer for the assessment years 2010-11, 2011-12 & 2012-13, wherein, the Assessing Officer had categorically asked the assessee to show cause why the additions as proposed by the Transfer Pricing Officer (TPO) was not to be made in the assessment. Other issues were also raised in the notice u/s.142(1) of the Act. It was the submission that the

assessee replied to the notice u/s.142(1) of the Act, however, did not give any reply in respect of first issue raised by the Assessing Officer in response to notice u/s.142(1). The Id CIT DR has filed written submission as follows:

"a) **In** this case, sufficient opportunity was given by the A.O. to the assessee company for rebuttal of the proposed adjustment as suggested by the TPO vide his order passed u/s 92CA(3) dated 18.02.2014/29.01.2016, through a show-cause notice, dated 26.02.2014/18.03.2016/22.03.2016. In response, the assessee company also filed reply dated 06.03.2014/28.03.2016. The assessee's submissions were perused and considered. However the submissions of the assessee company were not found acceptable. Accordingly, the assessment order was passed as discussed above and delivered to the assessee along with notice of demand u/s 156 and penalty notice u/s 274 r.w.s. 271(l)(c) of the Act. In nutshell, order cannot be said an invalid one because the sum and substance of the order regarding proposed adjustment is on a strong footing and cannot be challenged. The procedural lapse is a rectifiable mistake without altering the crux of the case.

b) The failure to adhere to the mandatory requirement of issuing a draft assessment order under Section 144C (1) of the Act would, at best, be a curable defect. Accordingly the matter must be restored to the AO to pass a draft assessment order and for the assessee company, thereafter, to pursue the matter before the DRP.

c) **Reliance is placed on the judgement of Hon'ble Delhi High Court in the case of St. Microelectronics (P.) Ltd. vs. NFAC (132 taxmann.com 118) wherein on similar facts & circumstances,** the matter was remanded back to the Assessing Officer who was asked to issue a draft assessment order within two weeks and grant an opportunity of hearing to the appellant company and pass a reasoned order in accordance with law.

d) Reliance is placed on the judgement of Hon hie Jurisdictional High Court in the case of CIT vs. Shiv Kumar Agarwal (186 ITR 734) wherein it was held that once the proceedings have been validly initiated, then by any irregularity in the course of proceedings, proceeding itself does not come to an end. Therefore the matter should be restored to the A.O. to pass a draft assessment order

u/s.144C(1) of the Act. The assessee company will be at the liberty to approach the DRP if required.”

9. It was the submission that it is an admitted fact that the draft assessment orders were not issued for the assessment years 2010-11, 2011-12 & 2012-13. However, draft assessment orders had been issued for the assessment year 2013-14 & 2014-15. It was the submission that if at all, the issuance of draft assessment orders for the assessment years 2010-11 to 2012-13 is considered as lapse, it should be considered as procedural lapse and in view of the decision of Hon’ble Delhi High Court in the case of St. Microelectronics Pvt Ltd., vs NFAC (2021) 132 taxmann.com 118, the issues should be restored to the file of the Assessing Officer to pass the draft assessment order, grant the assessee adequate opportunity of being heard and passed a reasoned order in accordance with law. He also placed reliance on the decision of Hon’ble Jurisdictional High Court in the case of Shiv Kumar Agarwal vs CIT, 186 ITR 734 (Ori), wherein, it has been held that once the proceedings have been validly initiated then on account of any irregularity in the course of the proceedings, the proceedings itself does not come to an end. The Hon’ble High Court had proceeded to hold that the proceedings be restored to the point where the irregularity occurred and the issue should be permitted to be proceeded therefrom to its logical conclusion. For the assessment years 2013-14 & 2014-15, it was the submission that the draft assessment orders had been issued and the

assessment had been completed and consequently, for the assessment years 2013-14 & 2014-15, the order of the Id CIT(A) was liable to be reversed. He further submitted that in the decision of Hon'ble Delhi High Court in the case of St. Microelectronics Pvt Ltd (supra), the decision of Hon'ble Bombay High Court in the case of International Air Transport Association vs DCIT, 68 taxmann.com 246, the decision of Hon'ble Gujarat High Court in the case of CIT vs C-Sam (India) Pvt Ltd., 398 ITR 182 (Guj), the decision of Hon'ble Delhi High Court in the case of DCIT vs Control Risks India Pvt Ltd., (2019) 107 taxmann.com 83 (Del) and other decisions have also been considered, wherein, on account of non-issuance of the draft assessment order, the assessment had been held to be null and void. It was the submission that the decision of Hon'ble Delhi High Court in the case of St. Microelectronics Pvt Ltd (supra), being the latest decision, the same is liable to be followed.

10. In reply, Id AR submitted that for the assessment years 2010-11 to 2012-13, admittedly, no draft assessment orders had been issued but for the assessment years 2013-14 & 2014-15, the draft assessment orders had been admittedly issued, however, they were accompanied with the demand notice u/s.156 alongwith show cause notice in respect of levy of penalty u/s.271(1)(c) being a notice u/s.274 r.w.s 271 of the Act. It was the submission that in respect of both the conditions i.e. being non-issuance of the draft assessment order as also in respect of the situation where the

draft assessment order has been issued but alongwith demand notice and show cause notice for the levy of penalty, various Courts have held that this has rendered the proceedings invalid and has quashed the assessment. It was fairly agreed by Id AR that for the assessment year 2013-14 and 2014-15, though the draft assessment orders had been issued but accompanied with demand notice u/s.156 and show cause notice under section 274 r.w.s 271 and subsequent assessment orders have also been passed and served on the assessee alongwith demand notice u/s.156 and show cause notice under section 274 r.w.s 271. It was the submission that in the first category of the appeals, where no draft assessment order had been passed, the assessment orders are liable be quashed as rightly done by the Id CIT(A) insofar as the issues are squarely covered by the decision of Hon'ble A.P. High Court in the case of Zuari Cement Ltd vs ACIT in W.P. No.5557/2012 order dated 21.2.2013, wherein, the Hon'ble High Court has held as follows:

"It is not disputed that the memorandum explaining the Finance Bill and the notes and clauses accompanying the Finance Bill which preceded the Finance (No.2) Act 2009 clearly indicated that the amendments relating to S.144C would take effect from 1.10.2009. In our view, the circular No.5/2020 issued by the CBDT stating that S.144C(1) would apply only from the assessment year 2010-11 and subsequent years and not for the assessment year 2008-09 is contrary to the express language in S.144C(1) and the said view of the Revenue is unacceptable. The circular may represent only the understanding of the Board/Central Government of the statutory provisions, but it will not bind this court or the Supreme Court. It cannot interfere with the jurisdiction and power of this court to declare what the legislature says and take a view contrary to that

declared in the circular of the CBDT (Ratan Melting and Wire Industries Case (1 supra), Indra Industries (2 supra). The Revenue has not been able to persuade us to take a contra view by citing any authority.

In this view of the matter we are of the view that the impugned order of assessment dt. 23.12.2011 passed by the respondent is contrary to the mandatory provisions of S.144C of the Act and is passed in violation thereof. Therefore, it is declared as one without jurisdiction, null and void and unenforceable. Consequently, the demand notice dated 23.12.2011 issued by the respondent is set aside."

11. Similar is the view expressed by the Hon'ble Madras High Court in the case of Vejay Television Pvt Ltd reported in 369 ITR 113 (Mad). Similar is the view expressed by Hon'ble Gujrat High Court in the case of CIT vs C-Sam (India) Pvt Ltd., 398 ITR 182 (Guj), Delhi High Court in the case of JCB India Ltd vs DCIT, 398 ITR 189 (Del) as also the decision of Jurisdictional Tribunal of ITAT, Cuttack in the case of ARSS Atlanta JV vs ITO in ITA No.358 to 360/CTK/2018 order dated 21.1.2020. It was the submission that for the assessment years 2010-11 to 2012-13, as the Assessing Officer has not proposed any draft assessment order as per the mandate of section 144C(1) & (2) and as no such draft assessment order has been served on the assessee, the Id CIT(A) annulled the assessment order for three assessment years, hence, same was liable to be upheld.

12. In respect of assessment years 2013-14 and 2014-15, it was submitted by Id AR that for these two assessment years, though the draft assessment order had been served on the assessee, same are being accompanied by demand notice u/s.156 and show cause notice u/s.274

r.w.s 271. It showed that the proceedings had culminated with demand being raised on the assessee and the draft assessment orders would have been considered as final order and on this ground violating the provisions of section 144C(1) and consequently had rightly been annulled by the Id CIT(A). It was the submission that on identical facts various Benches of the Tribunal had held the same to be illegal and liable to be quashed. He placed reliance on the decision of Mumbai Benches of the Tribunal in the case of Aker Powergas pvt Ltd vs DCIT in ITA No.7211/Mum/2017 order dated 23.6.2022, the decision of Bangalore Benches of the Tribunal in the case of Cisco Systems Services BV vs DCIT dated 27.12.2021, Delhi Benches of the Tribunal in the case of Perfetti Van Melle (India) Pvt Ltd vs ACIT in ITA No.9116/Del/2019 dated 11.8.2020 and so on. It was the submission that as the demand notice u/s.156 and show cause notice under section 274 r.w.s 271 had been issued alongwith draft assessment order, the CIT(A) was right in annulling the assessment order for the assessment year 2013-14 and 2014-15. It was the prayer that order of the Id CIT(A) on this issue for both the assessment years was liable to upheld.

13. In reply, Id CIT DR placed before us the decision of the Hyderabad Benches of the Tribunal in the case of M/s. BS Ltd vs ACIT in ITA No.2187/Hyd/2017 for A.Y. 2014-15 order dated 29.11.2018, wherein, in para 7, the issue had been discussed and in paras 9 & 9.1, the Bench had held as follows:

"9. Considered the rival submissions and perused the material on record. The Id. AR submitted that the draft assessment was completed with demand notice u/s 156 and penalty notices u/s 271. By issuing such notices, the assessment order becomes final. Various courts have held that such assessment orders to be null and void ab-initio. We have carefully considered the submission and case laws relied. In all the case laws relied on by the assessee, the common mistake made by the AO in those assessments were that AO passed the final assessment order instead of Draft Assessment Order, the courts have held that as per section 144C(1), the AO has no right to pass final order pursuant to the recommendations made by the TPO. Accordingly, the order passed by the AO, thus, lacks jurisdiction.

9.1 In the light of the above, in the present case, the AO has passed the Draft 'Assessment' but sent demand notice and penalty notices along with the draft assessment order. Since the facts are not identical to the facts of the case laws relied on by the assessee, moreover, the AO has to pass draft assessment order as per provision and was accordingly passed by him. The accompanying notices along with the draft assessment order are only procedural mistakes, it cannot tantamount to passing of final assessment order. Accordingly ground raised by the assessee is dismissed."

14. It was the submission that the demand notice u/s.156 and show cause notice under section 274 r.w.s 271 alongwith draft assessment orders for the assessment years 2013-14 and 2014-15 were only procedural mistake did not tantamount to final assessment order. It was the submission that the order of the Id CIT(A) was liable to reversed.

15. We have considered the rival submissions. At the outset, before us, two set of facts have come into play. For the assessment years 2010-11 to 2012-13, no draft assessment orders had been passed much less served on the assessee. For the assessment years 2013-14 and 2014-15, draft assessment orders have been passed, however, they were served on the

assessee accompanied with demand notice u/s.156 and show cause notice under section 274 r.w.s 271. Here we must mention that the Id CIT(A) while adjudicating this issue for the assessment years 2013-14 and 2014-15, had not recognized the fact that draft assessment order had been served on the assessee insofar as in his findings, he held that the Assessing Officer has failed to forward the draft assessment order to the assessee as mandated by section 144C and directly proceeded to pass an assessment order under section 143(3) of the Act.

16. Now coming to the issue where no draft assessment order *per se* has been served on the assessee being assessment years 2010-11 to 2012-13, admittedly, the provisions of section 144C requires that a draft assessment order be served on the assessee so that the assessee would have his remedy available against such calculation and computation as done in the draft assessment order. The arguments of Id CIT DR that non-issuance of draft assessment order is only a mistake which should be rectified by restoration to the file of the Assessing Officer in the light of the decision of Hon'ble Delhi High Court in the case of St. Microelectronics Pvt Ltd (supra) is in our view unacceptable. True, the Hon'ble Jurisdictional High Court in Shiv Kumar Agarwal (supra) has held that where an irregularity has occurred, the proceedings should be restored to that point of irregularity and permitted to continue to its logical end. But what happens here is that an assessment order has been passed within a specified time. If that

assessment order has to be passed within a specified time but an irregularity has happened before passing the assessment order, such irregularity can be corrected by restoration. Here a statutory requirement u/s.144C has got violated, by restoring the issue back to the AO for passing necessary draft assessment order and then proceedings to its logical end would in effect be extending the limitation for passing the assessment order. An appellate authority does not have any powers to tinker with the law. It can at best to remove the kinks **in the** interpretation. Extension of limitation is in the exclusive jurisdiction of the Courts. This being so, in view of the decision of Hon'ble A.P.High Court in the case of Zuari Cement Ltd (supra), Hon'ble Madras High Court in the case of Vejay Television Pvt Ltd (SUPRA) the decision of Hon'ble Gujrat High Court in the case of CIT vs C-Sam (India) Pvt Ltd.(supra), Delhi High Court in the case of JCB India Ltd (supra) as also the decision of Jurisdictional Tribunal of ITAT, Cuttack in the case of ARSS Atlanta JV (supra), as the draft assessment order has not been issued for the assessment years 2010-11 to 2012-13, respectfully following the principles laid down by the Hon'ble High Courts (supra), the findings of the Id CIT(A) on this issue for the assessment years 2010 to 2011 to 2012-13 stands upheld.

17. Coming to the issue for the assessment years 2013-14 and 2014-15, admittedly, the assessment orders have also been passed and served on the assessee alongwith demand notice u/s.156 and show cause notice

u/s.274 r.w.s 271 of the Act. This has been done after the issuance of the draft assessment order. Just because the demand notice u/s.156 and show cause notice u/s.274 r.w.s 271 has been served on the assessee alongwith the draft assessment order would not make the draft assessment order as final assessment order insofar as issuance of demand notice u/s.156 or the show cause notice u/s.274 r.w.s 271, *per se* cannot be held to leads to culminate the assessment. Clearly a draft assessment order has been served on the assessee for the assessment years 2013-14 and 2014-15. A notice of demand u/s.156 is only a prescribed form to specify the sum payable as a consequence of an order. An assessment is done under the provisions of section 143(3)/144. Our attention is drawn to the decision of Hon'ble Apex Court in the case of Kalyan Kumar Ray vs CIT, 191 ITR 634 (SC), wherein, the Hon'ble Supreme Court has held that the assessment order involves determination of income and tax. It has also laid down that the assessment is one integrated process involving not only the assessment of the total income but also the determination of the tax. The latter is crucial for the assessee as the former. Here one is to understand that the demand notice u/s.156 is not one time notice. The notice u/s.156 is issued every time a demand is determined in any order and is not specific for only assessment order. We are also alive to the decision of the Hon'ble apex Court in the case of **Auto & Metal Engineers And Ors. vs Union Of India (Uoi) And Ors., 229 ITR 399 (SC)**, wherein the Hon'ble Supreme

Court has held that the process of assessment involves filing of the return, enquiries by the AO, making the order of assessment and issuance of notice u/s.156. In the present case for the assessment year 2013-14 and 2014-15, final assessments have also been issued and those orders are also accompanied by demand notice u/s.156 and show cause notice u/s.274 r.w.s 271. The notice of demand u/s.156 which accompanied the draft assessment and which accompanied final assessment order had no variation except in the date. For the assessment years 2013-14 & 2014-15, the provisions of section 144C(1) had been procedurally complied with insofar as the draft assessment order had been served on the assessee and subsequent to the same final assessment order has been served. Just because the notice u/s.156 had accompanied the draft assessment order, it cannot be said that the assessment got culminated with the draft assessment order itself. The issuance of the demand notice u/s 156 and show cause notice u/s.274 r.w.s 271 alongwith draft assessment order is nothing but a technical breach. Obviously, when technicality is pitted against substantial justice. Technicality will have to step down.

18. A perusal of the grounds of appeal filed by the assessee before the Id CIT(A) shows that merits have also been raised before the Id CIT(A). This being so, we are of the view that the AO has complied the statutory requirement of section 144C(1) by issuance of draft assessment order for the assessment years 2013-14 & 2014-15, the findings of the Id CIT(A) on

this issue for the assessment years 2013-14 & 2014-15 stands reversed. However, as it is noticed that the issues on merits for the assessment years 2013-14 & 2014-15 have not been adjudicated by the Id CIT(A), hence, in the interest of justice, the issues are restored to the file of the Id CIT(A) for the assessment years 2013-14 & 2014-15 for adjudication on merits. The appeals of the revenue for the assessment years 2013-14 & 2014-15 stands partly allowed for statistical purposes.

19. In the cross objections filed by the assessee, there are basically three issues i.e. (i) common issue is regard to levy of education cess.

20. Ld A.R. has withdrawn the said ground and has signed to that effect. Consequently, the issue in regard to levy of education cess on the Income tax Act and Dividend distribution Tax paid is dismissed as not pressed.

21. In the cross objections for the assessment years 2010 – 2011, 2011-12 and 2012-13, the assessee has raised grounds in support of the order of the Id CIT(A). As we have already upheld the order of the Id CIT(A) for the assessment years 2010-11 to 2012-13, the said grounds of cross objection have become infructuous and stands dismissed.

22. For the assessment years 2013-14 and 2014-15 also, the assessee has raised ground in the support of the order of the Id CIT(A). As we have reversed the order of the Id CIT(A) for the assessment years 2013-14 & 2014-15 and restored the issue to his file for adjudication on merits, the

grounds in the cross objection filed by the assessee consequently stands dismissed.

23. For the assessment year 2012-13 to 2014-15, the assessee has raised the issue in respect of payment of dividend distribution tax paid to non-resident shareholder by applying rate of 15% as prescribed in Indian Income tax Act, 1961 or rate of 10% applicable to the Double Taxation Avoidance Agreement between India and Japan. Ld CIT DR submitted that this issue was not raised before the lower authorities. Ld AR fairly agreed that that the issue was not raised before the lower authorities. It is further prayed that he had no objection if the issue is restored to the file of the AO for adjudication. Consequently, for the assessment year 2012-13, this issue is restored to the file of the AO for adjudication. For the assessment years 2013-14 & 2014-15, this issue is restored to the file of the Id CIT(A) before whom, the assessee is at liberty to argue in support of this claim. Ld CIT(A) would call remand report from the Assessing Officer in regard to this issue.

24. The cross objection for the assessment year 2010-2011 & 2011-12 is dismissed, cross objection for the assessment years 2012-13, 2013-14 and 2014-15 stands partly allowed for statistical purposes.

25. In the result, appeals of the revenue for the assessment years 2010-11 to 2012-13 stand dismissed and appeals for the assessment years 2013-14 & 2014-15 stands partly allowed for statistical purposes.

Order dictated and pronounced in the open court on 23/8/2022.

Sd/-

sd/-

(Arun Khodpia)
ACCOUNTANT MEMBER

Cuttack; Dated 23/8/2022
B.K.Parida, SPS (OS)

(George Mathan)
JUDICIAL MEMBER

Copy of the Order forwarded to :

1. The Appellant :
2. The Respondent:
3. The CIT(A)-, Cuttack
4. Pr.CIT-, Sambalpur
5. DR, ITAT, Cuttack
6. Guard file.
//True Copy//

By order

Sr.Pvt.secretary
ITAT, Cuttack